BGMC HOLDINGS BHD v. FULLOOP SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN JC
[ORIGINATING SUMMONS NO: WA-24NCC-291-06-2021]
30 SEPTEMBER 2022

Abstract – *In exercising its power to sanction a scheme of arrangement, the court will consider whether: (i) the provisions of the statute have been complied with; (ii) the class is fairly represented by those who attended the meeting and the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and (iii) the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.*

COMPANY LAW: *Arrangement, scheme of – Sanction – Company proposed scheme of arrangement to pay off debts, continue major projects and continue as going concern – Whether statutory requirements under s. 366(1) and (3) of Companies Act 2016 complied with – Whether requirement that 75% of total value of creditors or class of creditors or members of class of members present and voting had been met – Whether class was fairly represented by those who attended meeting – Whether statutory majority were acting bona fide and not coercing minority in order to promote interests adverse to those of class whom they purported to represent – Whether scheme was such as intelligent and honest member, member of class concerned and acting in respect of his interest, might reasonably approved*

This was an application by the applicant for sanction of this court in respect of a scheme of arrangement pursuant to, *inter alia*, s. 366(3) of the Companies Act 2016 ('Act'). The respondents were made parties to this application pursuant to four consent orders that were entered. The applicant had agreed to allow the respondents to intervene and oppose the application. The applicant was the shareholder of BGMC Corporation Sdn Bhd ('BGMCCSB') and owned 100% of the ordinary shares by BGMCCSB and enjoyed 100% voting rights in BGMCCSB. BGMC International Limited ('BGMCIL') was the ultimate holding company of BGMCCSB. BGMCCSB urgently needed to restructure its financial affairs and a scheme of arrangement was proposed as with the sanction of the scheme, BGMCCSB can (i) pay off its debts under 30 pending suits; (ii) continue with its three major projects which were expected to be completed within 12 to 24 months; (iii) ensure that the work programme and resources allocated to the completion of the above projects would not be affected; and (iv) focus on securing more works and projects, and enable itself to continue as a going concern, which was needed to be able to generate income to pay debts to the other unsecured creditors. The

applicant further maintained that under the scheme, (i) there was only 50% compromise of the debts owed to Category A Scheme Creditors and 30% compromise of the debts owed to Category B Scheme Creditors; (ii) immediately within three months after the scheme becomes effective, 20% of the compromised sums owed to both Category A and Category B Scheme Creditors shall be settled by payment in cash; and (iii) the remaining 80% of the compromised sums shall be converted into redeemable secured loan stocks ('RSLS') to be issued by BGMCCSB within three months after the scheme becomes effective and this could benefit the scheme creditors. The respondents argued that: (i) the classification of scheme creditors was improper; (ii) the outcome of the court convened creditor's meeting ('CCM') did not fairly represent the view of the scheme creditors and the votes of the BGMCCSB's related companies ought to be disregarded/discounted; (iii) the scheme was unfair and not *bona fide* as there was non-disclosure of material facts and/or disclosure of misleading and inaccurate facts contained in the explanatory statement; (iv) the scheme was unreasonable and reeked of uncertainty and it was against commercial morality to sanction such a scheme; (v) BGMCCSB was hopelessly insolvent; and (vi) the CCM was procedurally flawed as the applicant failed to communicate its decision on the proof of debts to the respondents and/or provide an opportunity to the respondents to appeal against the decision.

Held (allowing application):

(1) The similarity of rights was tested upon the rights of each creditor in the event of liquidation, namely whether the rights of these creditors were similar in a liquidation scenario. In liquidation, BGMCIL and other creditors were all ranked in *pari passu* as their debts were all unsecured. The legal rights of BGMCIL against BGMCCSB was the same with that of other unsecured creditors. These companies ought to be classified in one single class with the remaining unsecured creditors. (paras 64-67)

(2) The success of the scheme required BGMCCSB to survive and continue as a going concern and obtain income to satisfy BGMCCSB's debts of its scheme creditors which included the respondents. Therefore, it would be in the interest of all the scheme creditors for BGMCCSB to 'survive'. It was unavoidable in some cases that the company undergoing restructuring under s. 366 of the Act would have related party creditors but this did not necessarily mean that those creditors should be treated differently or classed separately when their rights against the company were the same as the other non-related party creditors. In the circumstances, the classification of the scheme creditor was proper as the scheme creditors were classified based on their 'rights against BGMCCSB' and not their 'interest'. (paras 71, 74 & 76)

(3) Since the classification of the scheme creditors was proper, it did not stand to reason why the votes of the scheme creditors related to BGMCCSB ought to be discounted or disregarded. Firstly, s. 366(3) of the Act conferred the right of the scheme creditors under a scheme of arrangement to vote. Secondly, there was nothing in the Act that empowered the court to discount or disregard the scheme creditors' votes. In fact, in order to determine if the 75% threshold requirement was met under s. 366(3) of the Act, the scheme creditors must be allowed to vote on the scheme. The court would not approve the scheme of arrangement if the court finds, based on the *bona fide* and the reasonableness tests, that: (i) the class was not fairly represented by those who attended the meeting and that the statutory majority were not acting *bona fide* and were coercing the minority in order to promote interests adverse to those of the class whom they purported to represent; and (ii) the scheme of arrangement was such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably not approve. Despite the respondents' allegations that the *bona fide* test was not satisfied, they had not shown any evidence that the class was not fairly represented or that the majority was not acting *bona fide* or that the minority was being coerced to promote interests adverse to those of the class whom they purported to represent. The statutory 75% threshold requirement had been met and the *bona fide* and reasonableness tests had both been satisfied. (paras 79-85 & 146)

(4) The respondents' complaints were not because the information was misleading or insufficient. Rather, the respondents' criticism of the scheme was something that came about after the CCM and was centred on challenging the scheme by searching for weaknesses in it after it was approved by a majority of the scheme creditors. There were no merits in the respondents complain that the scheme was unfair and lacked *bona fide*. (paras 129 & 130)

(5) The respondents' allegation that BGMCCSB was hopelessly insolvent was based on its simple analysis and deduction of BGMCCSB's financial position by comparing BGMCCSB's projected cashflow against the scheme debt. The respondents' allegation was not supported by, for example, a counter report or analysis by a financial expert or professional. Therefore, the court was not persuaded by the respondents' argument that BGMCCSB was hopelessly insolvent. (paras 141 & 143)

Case(s) referred to:

Airasia X Bhd v. BOC Aviation Ltd & Ors [2021] 1 LNS 188 HC ***(dist)***

Francis Augustine Pereira v. Dataran Mantin Sdn Bhd & Ors And Other Appeals [2014] 1 CLJ 161 FC ***(refd)***

In Re Sateras Resources (Malaysia) Bhd [2005] 6 CLJ 194 HC ***(refd)***

Re ACM Gold Ltd (1992) 7 ACLR 231 ***(refd)***

Re Apcoa Parking Holdings GmbH [2016] 1 All ER 30 ***(refd)***

Re: App (Hong Kong) Ltd [2004] HKCU 477 ***(refd)***

Re Axa Asia Pacific Holdings Ltd [2011] VSC 4 ***(refd)***

Re BRL Hardy Ltd [2003] 45 ACSR 397 ***(refd)***

Re Century Sun International [2021] HKCU 4788 ***(refd)***

Re Kansa General International Insurance Co Ltd (in compulsory liquidation) [1999] 1 HKC 254 ***(refd)***

Re Landmark Corporation Ltd [1968] 1 NSWR 759 ***(refd)***

Re Lehman Brothers International (Europe) (in administration) [2018] EWHC 1980 (Ch) ***(refd)***

Re National Bank Ltd [1966] 1 All ER 1006 ***(refd)***

Re Sonodyne International Ltd [1994] 15 ACSR 494 ***(refd)***

Re Telewest Communications plc (No 2); Re Telewest Finance (Jersey) Ltd (No 2) [2005] 1 BCLC 772 ***(refd)***

Re UDL Holdings Ltd & Ors [2002] 1 HKC 172 ***(refd)***

Re UDL Holdings Ltd & Ors [2006] HKCU 917 ***(refd)***

Sentoria Bina Sdn Bhd v. Impak Kejora Sdn Bhd & Ors (Interveners) [2021] 9 CLJ 814 HC ***(refd)***

Sovereign Life Assurance Co v. Dodd [1892] 2 QB 573 ***(refd)***

The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd and another appeal [2012] SGCA 9 ***(dist)***

Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors [2012] 9 CLJ 1071 HC ***(refd)***

Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd [2003] SGCA 23 ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 366(1)(b), (2), (3), (4), 368(2)(d)

For the applicant - Yap Boon Hau & Goh Zhi En; M/s Mah-Kamariyah & Philip Koh
For the respondents - Lee Kai Jun; M/s Wayne Siang, Kai & Co

Reported by Lina E

JUDGMENT

Wan Muhammad Amin JC:

[1] This was an application by the plaintiff *via* originating summons dated 23 June 2021 (encl. 1) ("this originating summons") for sanction of the court in respect of a scheme of arrangement pursuant to, *inter alia*, s. 366(3) of the Companies Act 2016 ("CA 2016 2016"). The reliefs prayed for in this originating summons are specifically as follows:

1. That the Scheme of Arrangement of BGMC Corporation Sdn Bhd [Company Registration No: 199601008689 (381037-A)] ("BGMCCSB") as set out in the Explanatory Statement dated 25-5-2021 as annexed herein as "Lampiran A", which has been circulated to all Scheme Creditors and approved by the Scheme Creditors in the Court Convened Creditors' Meeting on 16-6-2021, be approved by this Honourable Court and bind on BGMCCSB and all Scheme Creditors with effect from the date of this Order in accordance to Section 366(3), (4), and (5) of the Companies Act 2016;

2. That BGMCCSB shall send by ordinary post (proof of which by way of certificate of posting) a copy of this Order to the Scheme Creditors to their last known address of each of the Scheme Creditors OR by email to the email address of the Scheme Creditors, and to advertise this Order once in English in "New Straits Times" and once in Malay in "Berita Harian" newspapers within twenty-one (21) days from the date of the sealed Order being extracted;

3. That BGMCCSB shall serve a copy of this Order to Companies Commission of Malaysia within fourteen (14) days from the date of the sealed Order being extracted;

4. That BGMCCSB be exempted from complying with the requirement to annex this Order to every copy of the constitution of BGMCCSB issued after this Order has been made in accordance to Section 366(6) and (7) of the Companies Act 2016;

5. That the Applicant be at liberty to apply; and

6. Such further and/or other relief as this Honourable Court deems fit.

[2] After hearing arguments from all the parties, I granted order in terms of this originating summons on 13 January 2022 ("sanction order") and included an addition order as follows:

> As a condition for approval of the Scheme of Arrangement, the 43 parcels of retail lots known as V Residensi 2 @ Shah Alam identified in paragraph 26.1 of the Explanation Statement at page 196 of the Applicant's Affidavit In Support affirmed on 28.12.2021 in Enclosure 98, be discharged from encumbrances imposed by the banks, within 30 days from the date of this Order;

[3] The respondents were made parties to this originating summons pursuant to four consent orders that were entered on 26 July 2021. The applicant had agreed to allow the respondents to intervene and oppose this originating summons.

A **Salient Background Facts**

The Applicant

[4] The applicant is the shareholder of BGMC Corporation Sdn Bhd ("BGMCCSB"). The applicant owns 100% of the ordinary shares issued by
B BGMCCSB and enjoys 100% of voting rights in BGMCCSB.

Directors	1. Dato' Teh Kok Lee 2. Dato' Mohd Arifin bin Mohd Arif
Shareholders	1. BGMC Malaysia Limited

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BGMC Corporation Sdn Bhd ("BGMCCSB")

[5] BGMCCSB has a total issued and paid-up capital of RM99,300,000 consisting of 10,000,000 ordinary shares (2,000,000 ordinary shares with cash consideration and 8,000,000 ordinary shares with consideration
D otherwise than cash), and 89,300,000 preference shares (31,730,000 preference shares with cash consideration and 57,570,000 preference shares with consideration otherwise than cash). The preference shareholder has no voting right like ordinary shareholder. As such, the applicant is the sole controlling shareholder of BGMCCSB.

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Directors	1. Dato' Teh Kok Lee 2. Azham Malik bin Mohd Hashim 3. Dato' Mohd Arifin bin Mohd Arif (resigned on 30-8-2021)
Shareholders	1. BGMC Holdings Berhad - 10,000,000 ordinary shares 2. Sparks Energy 1 Sdn Bhd - 89,300,000 preference shares

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[6] BGMCCSB is in the business of civil engineering and principally
G engaged in a wide range of construction services. It has over 20 years of proven tracked record with extensive experience and expertise, particularly in the area of public private partnership projects based on the built, lease, maintain and transfer model. Its major clients comprise of established developers and Government-linked companies.

H *BGMC International Limited ("BGMCIL")*

[7] BGMC International Limited ("BGMCIL") owns 100% shares in BGMC Malaysia Limited, and it indirectly owns 100% shares in the applicant. Thus, it is the ultimate holding company of BGMCCSB. BGMCIL is a company incorporated in Cayman Islands with limited liability on
I 18 November 2016. BGMCIL's shares are listed on Stock Exchange of Hong Kong Limited.

Directors	1. Dato' Teh Kok Lee 2. Dato' Mohd Arifin bin Mohd Arif (resigned on 30-8-2021) 3. Kua Choh Leang 4. Tan Sri Dato' Seri Kong Cho Ha 5. Datuk Kamalul Arifin bin Othman
Shareholders	1. Prosper International Business Limited – 48% 2. Seeva International Limited – 19.1% 3. Kingdom Base Holdings Limited – 7.9% 4. Public float – 25%

Background Of The Scheme Of Arrangement

[8] The background of the scheme of arrangement ("scheme") as stated by the applicant in its affidavit in support (encl. 2) is as stated below.

[9] Due to the sluggish property market and global economic turbulence resulting from the Covid-19 outbreak, the financial performance of BGMCCSB had been affected and it has then been in financial difficulties as it recorded a net loss of RM67,910,872 during financial year 2019 (on audited account) and RM144,392,144 (on management account) as at 28 February 2021.

[10] BGMCCSB's construction project work schedules were affected by the disruption to the supply of building materials when China imposed a lock-down on its major cities to contain the spread of the Covid-19. Substantial amount of building materials of BGMCCSB are imported from China.

[11] Thereafter on 18 March 2021, Malaysian Government implemented the Movement Control Order ("MCO") which had stopped and limited the operation of construction works of BGMCCSB.

[12] As consequence thereof, BGMCCSB's cash flow was affected. Due to the slowing down of property markets and decrease of operation for construction activity on site, the profit generated from the operation has substantially decreased. This led to a deteriorating liquidity position and BGMCCSB became increasingly unable to meet its working capital requirements and satisfy its debt obligations.

[13] However, BGMCCSB is still an active business enterprise with ongoing construction projects which are revenue-generating.

[14] In view of the aforesaid, BGMCCSB urgently needed to restructure its financial affairs to meet its obligation to pay the outstanding debts. Hence, a scheme of arrangement was proposed to allow the unsecured creditors whose debts are unsecured, to receive a higher return than they would otherwise receive in a liquidation scenario.

The First Scheme

[15] The following are the particulars of the scheme first proposed to the scheme creditors:

(i) The proposed scheme aimed to restructure BGMCCSB's debts of RM271,076,432.87 owed to the scheme creditors (as at 28 February 2021);

(ii) The scheme liabilities comprise of the amounts of unsecured liabilities owed to the scheme creditors, who would be categorised into two categories:

Category A

Scheme Creditors whose debts were incurred for providing goods and services for projects that have been completed or handed over or terminated.

Settlement of Category A Scheme Creditors' claims at RM0.30 to every RM1 owed on the principal amount.

The amount owing to BGMCIL (amounted to RM124,987,469.48 as at 28 February 2021) are **included** in this category, in which such amount (RM37,496,240.84 upon waiver of 70% of the amount owed) would be **subordinated** until all the debts for the remaining scheme creditors are fully settled.

Category B

Scheme Creditors who are existing customers/suppliers/vendors of BGMCCSB for ongoing or upcoming projects.

Settlement of Category B scheme creditors' claims at RM0.50 to every RM1 owed on the principal amount.

[16] On 17 March 2021, the applicant *vide* High Court of Kuala Lumpur Originating Summons No. WA-24NCC-125-03-2021 ("OS 125"), applied for leave to convene the court convened creditor's meeting ("CCM") and for a restraining order to preserve the assets of BGMCCSB pending approval of the scheme by the scheme creditors and the court.

[17] An *ex parte* order dated 29 March 2021 ("*ex parte* order") was granted for BGMCCSB to convene the CCM and a restraining order to restrain action/proceedings against BGMCCSB ("restraining order"). Further, the applicant on 6 April 2021, applied to court *vide* a notice of application in encl. 16 of OS 125, for a validation order for BGMCCSB to dispose of the 100% paid up shares in KAS Engineering Sdn Bhd for a total consideration of RM93,787,000, in which RM40,000,000 of the consideration is to be used for the purpose of the scheme.

[18] The restraining order granted *vide* the *ex parte* order had expired on 26 June 2021. As such, BGMCCSB had applied to the court to intervene in OS 125 and for an extension of the restraining order. The court had on 8 July 2021 and 26 July 2021 respectively, allowed the intervention of BGMCCSB in OS 125 and the extension of the restraining order for a period of nine months from 27 June 2021.

The Proposed Scheme For Sanction

[19] Subsequent to the order dated 29 March 2021 being granted, BGMCCSB together with their scheme adviser had engaged with the scheme creditors, particularly with the existing contractors and suppliers which form the major bulk of the creditors to present the proposed scheme and to gain their feedbacks and comments.

[20] Some of the scheme creditors had expressed their concern over the discount rate proposed and the uncertainty associated with the issuance of ordinary shares in the special purpose vehicle ("SPV")/BGMC Estate Sdn Bhd. As such, taking into account the feedbacks and comments from the scheme creditors, BGMCCSB had improved, revised and formulated the explanatory statement dated 25 May 2021 ("ES" or "explanatory statement") with modification to the originally proposed scheme as follows:

No.	Details	Original Scheme	ES
1.	Discount rate for Category A Scheme Creditors	70%	50%
2.	Discount rate for Category B Scheme Creditors	50%	30%
3.	Repayment of 20% claims (after waiver)	Cash	Cash
4.	Repayment of 80% claims (after waiver)	Issuance of ordinary shares of RM1.00 each in the issued and paid up share capital of BGMC Estate Sdn Bhd /special purpose vehicle ("**SPV**")	Redeemable Secured Loan Stock to be issued by BGMCCSB to be redeemed in full without any set-off or withholding or deduction within 36 months from date of issue.

[21] The position of the scheme creditors has been improved as compared to the first proposed scheme as follows:

(i) The scheme creditors will receive higher return percentage; and

(ii) The repayment of 80% claims would be *vide* issuance of redeemable secured loan stock which is to be redeemed in full without any set-off or withholding or deduction, which provide more certainty to the scheme creditors as compared to issuance of ordinary shares in the BGMC Estate Sdn Bhd/the SPV as proposed in the first proposed scheme.

[22] On 25 May 2021, BGMCCSB had circulated the notice of CCM, the ES and form of proxy to the scheme creditors. On the same day, the notice of CCM was advertised in Malay language once in Berita Harian and in English language once in The Star newspaper.

[23] After finalisation of amounts owed to scheme creditors as at 28 February 2021 by examining the proof of debts and relevant supporting documents from the scheme creditors, the liabilities in book comprises the claim of principal amounts by the scheme creditors (excluding all interest, penalty and/or default interest, late payment interest, costs and other charges of a similar nature in payments incidental thereto (including but not limited to all legal fees) accrued and to be accrued) up to and including 28 February 2021 of approximately RM263,663,093.54.

[24] The scheme creditors will not be divided into classes but shall be categorised into two categories, namely Category A scheme creditors and Category B scheme creditors as follows:

(i) Category A Scheme Creditors:

Scheme creditors whose debts were incurred for providing goods and services for projects that have been completed or handed over or terminated. Also included in this category are the amounts owing to the BGMCIL, whose debts will be subordinated until all the debts of the scheme creditors are fully settled and redeemable secured loan stocks to be issued by BGMCCSB ("RSLS") redeemed.

The amount owing to Category A scheme creditors amounted to RM199,141,624.38 as at 28 February 2021.

(ii) Category B Scheme Creditors:

Scheme creditors who are existing customers/suppliers/vendors of BGMCCSB for ongoing projects.

The amount owing to Category B scheme creditors amounted to RM64,521,469.16 as at 28 February 2021.

[25] BGMCCSB's liabilities in book will be settled on the following salient terms as provided in the ES:

(i) Category A scheme creditors' compromised sum to be settled at RM0.50 for every RM1 owed on the principal amount;

(ii) Category B scheme creditors' compromised sum to be settled at RM0.70 for every RM1 owed on the principal amount;

(iii) The settlement of the Category A and Category B scheme creditors' compromised sum shall be carried out in the following manner:

(a) Settlement of 20% of both Category A scheme creditors' compromised sum and Category B scheme creditors' compromised sum, to be paid in cash within three months of the effective date; and

(b) Settlement of 80% of both Category A scheme creditors' compromised sum and Category B scheme creditors' compromised sum, *via* conversion into RSLS to be issued by BGMCCSB within three months of the effective date subject to the requisite approvals of the relevant authorities being obtained. For the purposes of such conversion of debts into RSLS, in the event any part of the amount of net debt due to any scheme creditors is less than RM1, those scheme creditors irrevocably waive such amount which is less than RM1 in connection with the conversion.

[26] Upon implementation of the scheme, the amounts payable to scheme creditors are summarised in the table below:

	Category A (50% waiver)	**Category B (30% waiver)**	**Total**
Total Amount Owed	RM199,141,624.38	RM64,521,469.16	RM263,663,093.54
Total Amount Payable After Applying Waiver	RM99,570,812.19	RM45,165,028.41	RM144,735,840.60
– by way of Issuance of RSLS (80%)	RM79,656,649.75	RM36,132,022.73	RM115,788,672.48
– by way of Cash (20%)	RM19,914,162.44	RM9,033,005.68	RM28,947,168.12

[27] The following are the projected income which BGMCCSB intends to utilise to repay the scheme creditors and details of how the said income will be applied:

Source of Cash Flow	Amount (RM)
Proceeds from the disposal of KAS Engineering Sdn Bhd	40,000,000.00
43 parcels of retail lots known as V Residensi 2@Shah Alam ("**Retail Lots**")	25,000,000.00
Contra properties from debtor ("**Contra properties**")	36,098,440.00
Estimated collection through various future projects secured within 24 months ("**Future Projects**")	6,204,961.13
	107,303,401.13

Proceeds From Disposal Of KAS Engineering Sdn Bhd ("KAS"):

(i) The total consideration of disposal of KAS amounted to RM93,787,000;

(ii) Part of the proceeds from the disposal of KAS will be used for repayment of overdue bank facilities/rescheduled overdue bank facilities;

(iii) The sum of RM40,000,000 from the disposal of KAS will be utilised for the repayment to the scheme creditors;

(iv) The disposal of KAS has completed as at 11 June 2021.

Retail Lots

The market value of the retail lots have been appraised at RM25,000,000, pursuant to valuation conducted by Messrs. Firdaus & Associates dated 30 September 2020.

Contra Properties

The contra properties comprise of service apartment units, small office flexible office units, shop lots and land received from BGMCCSB's debtor, with total market value of RM36,098,440.

Future Projects

BGMCCSB is currently engaging in various projects and the sum of RM6,204,961.13 from the estimated amounts to be collected from the future projects, will be utilised for the repayment to the scheme creditors.

[28] It is important to note that BGMCIL's debt of RM124,987,469.48 under the scheme will be subordinated until all claims of the other scheme creditors are fully settled and RSLS to be issued by BGMCCSB redeemed as stated in para. 29 of encl. 2 as follows:

> The settlement of debts owing to BGMCIL, the ultimate holding company (amounting to RM124,987,469.48 as at 28-2-2021; RM62,493,734.80 upon the waiver of 50% of the amount owed) **will be subordinated until all the claims of the other Scheme Creditors are fully settled and RSLS to be issued by BGMCCSB redeemed.** However, the voting rights shall remain unchanged. (emphasis added)

[29] The CCM was called on 16 June 2021 by way of a virtual meeting *via* an online remote participation and voting ("RPV") facilities at Tricor Investor & Issuing House Services Sdn Bhd ("Tricor") TIIH online website, being an online platform in Malaysia. BGMCCSB appointed Tricor as the Poll Administrator and Official Scrutineer to verify the poll result of the CCM.

[30] During the CCM, the terms of the explanatory statement were deliberated and explained to all the scheme creditors who were present. The voting procedures through the remote voting facility and the manner to submit questions in real time were also explained to the scheme creditors who were present at the CCM.

[31] Before the scheme creditors cast their votes on the proposed scheme, a question-and-answer session ("Q&A session") was opened to the floor. The scheme creditors were given the opportunity to raise any questions, issues and/or concern with regard to the proposed scheme.

[32] The queries raised were dealt with and addressed by the chairman, the scheme adviser, the solicitors for the applicant and/or the authorised representative of the applicant.

[33] After the Q&A session had ended, the motion for the proposed scheme was put to the floor for voting. The poll results showed that the scheme creditors who were present at the CCM in person and by way of proxy had voted in support of the proposed scheme.

[34] The results of the poll are as follows:

	Voted For	**Voted Against**	**Abstain**
Value	195,423,386	25,943,524 **1st Respondent: Nil** **2nd Respondent: 691,632** **3rd Respondent: 3,056,711** **4th Respondent: 753,951** Other Votes Against: 21,441,230	6,154,151
Percentage (%)	88.2803	11.7197	–

A **Legal Requirements At The Sanction Stage Of The Scheme**

[35] This originating summons is in respect of the third and final stage of the three stages of the restructuring process under s. 366 CA 2016. For brevity, the three stages are as follows:

B (i) The application stage where an application is made to the court for leave to convene the CCM.

(ii) The meeting stage where the CCM will be held with the company's scheme creditors and in the present case, BGMCCSB's scheme creditors.

C (iii) The sanction stage where an application is made to the court for the court to approve the proposed scheme of arrangement ("application for sanction").

[36] The relevant provisions of CA 2016, namely ss. 366(1), (2), (3) and (4) are reproduced below:

D (1) The Court may, **on an application** under this Subdivision, order a **meeting** in a summary way to be **summoned in such manner as the Court directs, by** either:

(a) the company;

(b) any creditor or **member of the company;**

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(c) the liquidator, if the company is being wound up; or

(d) the judicial manager, if the company is under judicial management.

(2) A meeting held pursuant to an order of the Court made under F subsection (1) may be adjourned if the resolution for adjournment is approved by seventy-five per centum of the total value of creditors or class of creditors or the members or class of members present and voting either in person or by proxy at the meeting.

(3) The **compromise or arrangement shall be binding** on:

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(a) all the creditors or class of creditors;

(b) the members or class of members;

(c) the company; or

(d) the liquidator and contributories, if the company is being wound H up, if the compromise or arrangement **is agreed by a majority of seventyfive per centum of the total value of the creditors or class of creditors or members or class of members present and voting** either in person or by proxy at the meeting or the adjourned meeting **and has been approved by order of the Court.**

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(4) The **Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just.**

(emphasis added)

[37] It is important to note that the applicant here is not the company itself but a member of the company for which the scheme is proposed, BGMCCSB (s. 366(1)(b) CA 2016).

Procedure

[38] Whilst it was not made an issue by the respondents in this originating summons, I observed that the application for sanction was made *via* an originating summons and not *via* a notice of application filed under the application stage in OS 125.

[39] There is nothing in the Rules of Court 2012 ("ROC") or CA 2016 which specifies the method in which the application for sanction needs to be made, *ie*, *via* the filing of a fresh originating summons or by way of a notice of application made under the application stage.

[40] It has been said that once the court grants the orders under the originating summons at the application stage the action is concluded. It is therefore said that there would no longer be a pending suit or *lis pendens*. This then necessitates an applicant who wishes to obtain the court's sanction in respect of a scheme of arrangement under s. 366(3) CA 2016 to file a fresh action *via* an originating summons.

[41] However, I am of the view that the action or originating summons at the application stage is not completely concluded for the following reasons:

(i) The order for a CCM applied for at the application stage usually comes with a prayer for a restraining order under s. 368 CA 2016 and may and often do require extension as the initial restraining order is valid for three months only (s. 368(2) CA 2016). The applicant will then have to make the application to extend the restraining order in the same originating summons under the application stage.

(ii) The applicant may also require a validation order for the disposal of the property or shares of or owned by the company for which the scheme of arrangement is proposed.

(iii) There could also be variations or changes to the originally proposed scheme of arrangement which may then require the applicant to apply for further orders. For example, during the height of the Covid-19 pandemic there were applications made to court for the CCM to be conducted virtually instead of physically as originally proposed in the scheme of arrangement.

(iv) Very often the orders granted in an originating summons at the application stage includes a relief that the applicant be given liberty to apply to cater for, *inter alia*, changes in the proposed scheme of arrangement.

[42] The circumstances stated above would mean that the originating summons at the application stage is still not completely concluded. This is in addition to the fact that the restructuring process under s. 366 CA 2016 comes in three stages and therefore once the court grants orders under the originating summons at the application stage, the matter is in a state of "*stasis*". Depending on the outcome of the CCM the restructuring process could proceed to the sanction stage. Hence the originating summons filed under the application stage may still be *lis pendens.*

[43] I am of the considered view that for the above reasons and in particular for practical reasons the application for sanction should be made *via* a notice of application under the application stage action/originating summons. This is because the applicant at the sanction stage would have to set out the background and the events that have transpired from application stage to the CCM until sanction of the court is applied for. This would include reporting to the court on the compliance with the orders given at the application stage. In this regard the documents in respect of the application stage and the information regarding the orders that were made would already be in that court's record.

[44] Further, if a fresh originating summons is filed at the sanction stage, the matter may be heard by a different judge and the applicant would often request for the matter to be heard by the same judge who granted the orders at the application stage as that judge would be familiar with the applicant's restructuring exercise.

Factors To Be Considered At The Sanction Stage

[45] There are three factors that the court considers at the sanction stage as stated in the following cases:

(i) *Re Telewest Communications plc (No 2); Re Telewest Finance (Jersey) Ltd (No 2)* [2005] 1 BCLC 772 where it was held as follows:

> [20] The classic formulation of the *principles which guide the court* in considering whether to *sanction a scheme* was set out by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in *Buckley on the Companies Acts* (13th edn, 1957) p. 409, which has been approved and applied by the courts on many subsequent occasions:
>
> > In exercising its power of sanction the court will see, *first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.*

> The court does not sit merely to see that the majority are acting *bona fide* and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme. (emphasis added)

(ii) *Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors* [2012] 9 CLJ 1071 where it was held as follows:

> [23] Prior to considering each of these issues in turn, it is relevant to have regard to the **general principles by which the court is guided when considering a petition under s. 176(3) of the Companies Act 1965.** Learned counsel for MTB in his submissions set out the relevant case law. This is not in dispute. In *Re Sateras Resources (Malaysia) Bhd* [2005] 6 CLJ 194 Ramly Ali J (later FCJ) adopted the principles set out in *Buckley on the Companies Act*, 14th edn, 1981, pp. 473-474:
>
> > ... In exercising the power of sanction the Court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve. (emphasis added)

[46] To summarise, the court needs to consider the following at the sanction stage:

(i) Whether the statutory requirements of s. 366(1) and (3) CA 2016 have been complied with regards to the CCM in particular, the requirement that 75% of the total value of the creditors or class of creditors or members or class of members present and voting has been met ("the 75% threshold requirement").

(ii) Whether the class was fairly represented by those who attended the meeting and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent ("the *bona fide* test").

(iii) Whether the scheme of arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve ("the reasonableness test").

A **Fulfilment Of The Statutory And Other Requirements**

[47] In so far as the *ex parte* order is concerned the applicant has complied with the terms of the *ex parte* order as follows:

(i) The CCM was held virtually on 16 June 2021, which is within 90 days
B from the date of the *ex parte* order;

(ii) Notice of CCM, the ES and the form of proxy ("documents") were posted to the last known address of each of the scheme creditors on 25 May 2021, which is not less than 21 days' notice before the CCM, the documents were also made available on the website at https://
C www.bgmc.asia;

(iii) The notice of the CCM was advertised once in Malay in "Berita Harian" and once in English in "The Star" newspapers both on 25 May 2021, which is not less than 21 days' notice before the CCM;

D (iv) A copy of the documents was made available to the scheme creditors at the registered office of BGMCCSB at No. 18-3, Jalan PJU 8/5C, Damansara Perdana, 47820 Petaling Jaya, Selangor on working days between the hours of 9am to 5pm;

(v) The chairman of the CCM had reported to the court hearing OS 125,
E the results of the CCM;

(vi) Dato' Teh Kok Lee was nominated by the majority of the scheme creditors as a director of BGMCCSB (s. 368(2)(d) CA 2016). The total amount of scheme creditors who nominated his appointment as director under s. 368(2)(d) CA 2016 stands at 74%, representing the
F value of RM194,903,361.76;

(vii) On 8 April 2021, the contents of the s. 368 CA 2016 order was served and effected by way of advertisement of the order once in Malay in "Berita Harian" and once in English in "New Straits Times" newspapers both;
G

(viii) On 10 April 2021, the same was also advertised once in English in "The Star" newspaper.

[48] The scheme was approved by 88.28% of the value of the scheme creditors.
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[49] Therefore, the applicant has satisfied the statutory requirement of s. 366(3) CA 2016 in obtaining minimum 75% in value of scheme creditors and has in fact exceeded the said minimum requirement.

[50] In *Re ACM Gold Ltd* (1992) 7 ACLR 231, the Federal Court of
I Australia held that the following requirements have to be satisfied at the sanction stage:

(i) The CCM must be convened and held in accordance with the court order granted at the meeting stage (which in Malaysia would be under s. 366(1) CA 2016);

(ii) The scheme creditor must have approved the scheme of arrangement with the requisite majority as provided under the relevant statutory provision (present case under s. 366(3) CA 2016 or the 75% threshold requirement). (See also *Transmile* (*supra*)).

[51] As stated earlier the applicant has complied with the *ex parte* order in convening the CCM and as the applicant has also satisfied the 75% threshold requirement, it is now incumbent upon me to consider whether the scheme has passed the *bona fide* and the reasonableness tests.

[52] In order to assess the "reasonableness" and fairness of the scheme, the court would have to apply the reasonable businessman test (*Sentoria Bina Sdn Bhd v. Impak Kejora Sdn Bhd & Ors (Interveners)* [2021] 9 CLJ 814; *Re Axa Asia Pacific Holdings Ltd* [2011] VSC 4; *Re BRL Hardy Ltd* [2003] 45 ACSR 397; *Re Sonodyne International Ltd* [1994] 15 ACSR 494; *Transmile* (*supra*)).

[53] The position taken in the above cases can be summarised as follows:

(i) The court's role is supervisory at the sanction stage (*Re Axa* (*supra*));

(ii) The court does not second guess the commercial judgment of the shareholder and substitute it with its own commercial judgment (*Re Axa* (*supra*); *Re BRL Hardy* (*supra*); *Re Sonodyne* (*supra*); *Sentoria* (*supra*));

(iii) "Whether it is reasonable to suppose that sensible business people might consider that the arrangement proposed by the company is of benefit to its members" (*Re Sonodyne* (*supra*));

(iv) The court ought not embark on a careful analysis and dissection of the relative merits of one scheme as opposed to another or assessing the viability and benefit of the scheme of arrangement as against the winding up of the company (*Transmile* (*supra*)).

[54] Applying the principles stated above, in order for me to effectively determine whether the applicant has satisfied the *bona fide* and the reasonableness tests, I will need to consider the applicant's reasons for the scheme together with the objections raised by respondents.

Applicant's Position

[55] The reasons for which the applicant sought this court's sanction of the scheme as submitted by learned counsel for the applicant are summarised as follows:

(i) BGMCCSB requires the sanction of the scheme in order to pay off its debts under 30 pending suits in various courts in Malaysia against BGMCCSB as at 15 May 2021.

(ii) The scheme is needed so that BGMCCSB can continue with its three major projects, namely T035-Spice Hotel, T306-Seputeh and T042-Bangsar. These three projects are expected to be completed within the period of 12 to 24 months.

(iii) With the sanction of the scheme, BGMCCSB can ensure that the work programme and resources allocated to the completion of the above projects will not be affected. Further, BGMCCSB will then be able to focus on securing more works and projects and enable itself to continue as a going concern. Going concern of BGMCCSB is in turn needed to be able to generate income to pay the debts to the other unsecured creditors.

(iv) If the proposed scheme is not sanctioned and BGMCCSB is wound up:

(a) RM65,656,286 of the assets are subject to specific charges. Upon liquidation, these assets estimated realisable value amounts to only RM57,662,438, and it is estimated to be a deficit at RM71,707,626 for repayment to the secured creditors;

(b) In terms of unencumbered assets, the net book value of the non-current assets of BGMCCSB is at RM16,052,281. However, the estimated realisable value is at RM587,154 as most of the non-current assets of BGMCCSB are the value invested in subsidiary which are not readily realisable upon liquidation;

(c) For the unencumbered current assets, the net book value is of RM305,656,741, but the estimated realisable value amounts to only RM24,961,993;

(d) As such, the total book value of the assets despite being RM387,365,309, only RM25,549,147 is estimated to be available for the unsecured creditors, and at the same time, amount of RM71,707,626 will need to be repaid to the secured creditors who enjoy priority over the unsecured creditors. Thus, it is estimated that in a liquidation scenario, the unsecured creditors would be able recover only RM0.06 to every RM1 owed.

(v) Under the scheme:

(a) There is only 50% compromise of the debts owed to Category A scheme creditors and 30% compromise of the debts owed to Category B scheme creditors;

(b) Immediately within three months after the scheme becomes effective, 20% of the compromised sums owed to both Category A and Category B scheme creditors shall be settled by payment in cash;

(c) The remaining 80% of the compromised sums shall be converted into RSLS to be issued by BGMCCSB within three months after the scheme becomes effective, this could benefit the scheme creditors in the following manner:

(1) They could enjoy the preferential coupon in which the coupon of interest per annum from date of issue payable annually in arrears;

(2) The issuance of RSLS is secured with retail lots with market value of RM25,000,000 and the contra properties with market value of RM36,098,440;

(3) This will elevate unsecured to secured obligation against future unsecured obligation, offer a better protection to the scheme creditors in the event of liquidation.

Respondents' Objections

[56] The respondents' objections are summarised as follows:

(i) The classification of scheme creditors was improper;

(ii) The outcome of the CCM did not fairly represent the view of the scheme creditors and the votes of the BGMCCSB's related companies ought to be disregarded/discounted;

(iii) The scheme is unfair and not *bona fide* as there was non-disclosure of material facts and/or disclosure of misleading and inaccurate facts contained in the explanatory statement;

(iv) The scheme is unreasonable and reeked of uncertainty and it goes against commercial morality to sanction such a scheme;

(v) BGMCCSB is hopelessly insolvent and it is against public policy to sanction a scheme of a hopelessly insolvent company; and

(vi) The CCM was procedurally flawed as the applicant had failed to communicate its decision on the proof of debts to the respondents and/or provide an opportunity to the respondents to appeal against the decision.

[57] I will now deal with the respondents' above objections in detail below. However, some of these objections overlap and can be dealt with together such as the objection in paras. (iii) and (iv).

Improper Classification Of The Scheme Creditors (Related Companies)

[58] The main reason for the challenge on classification of creditors by the respondents was that BGMCCSB's related companies were classified within the same class as follows.

Description	Value (RM)
BGMC International Limited ("**BGMCIL**") – being the ultimate holding company of BGMCCSB and owns 100% of BGMCCSB through BGMC Holdings Berhad.	124,987,469.48
Built-Master Engineering Sdn Bhd – being the subsidiary company of BGMCCSB where BGMCCSB holds 80% of its shareholding.	1,386,784.02
Built-Master Elevator Engineering Sdn Bhd – being the indirect subsidiary company of BGMCCSB where BGMCCSB owns 80% shareholding of the company through Built-Master Engineering Sdn Bhd.	735,420.16
Total	**127,109,673.66**

[59] The respondents contend that:

(i) There is no community of interest between BGMCCSB's ultimate holding company, BGMCCSB's subsidiary companies and the remaining scheme creditors.

(ii) The remaining of the scheme creditors are only concerned with the repayment of debts whereas the BGMCCSB's ultimate holding company and subsidiary companies have a special interest in seeing the continuing survival of BGMCCSB.

[60] The question here is whether in a scheme of arrangement the related scheme creditors of the company must be placed in a different or separate class from the rest of the scheme creditors.

[61] The principle to be applied in determining the classification of creditors is whether their rights against the company, in this case BGMCCSB, are dissimilar (*Re UDL Holdings Ltd & Ors* [2002] 1 HKC 172; *Airasia X Bhd v. BOC Aviation Ltd & Ors* [2021] 1 LNS 188; [2021] 10 MLJ 942).

[62] In the Singapore case of *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* [2003] SGCA 23, it was held that a related party creditor does not constitute a separate class.

> There is a notable degree of consistency in this line of authority. The principle upon which the classes of creditors or members are to be constituted is that they should *depend upon the similarity or dissimilarity of their rights against the company and the way in which those rights are affected by the scheme, and not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights.* (emphasis added)

[63] A similar position was taken in the case of *Airasia X* (*supra*) where this issue was comprehensively dealt with in the following passages:

Test of classification of creditors

[50] The classic test for identifying classes is formulated by Bowen LJ in *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573 ('*Sovereign Life*') that a class 'must be confined to those persons *whose rights* are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'.

[51] This formulation has been subject to further refinements and clarifications in subsequent cases.

[52] In *Re Hawk*, Chadwick LJ at para. [33] stated:

> When applying Bowen LJ's test to the question *'are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements?'* it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements – so that they should have their own separate meetings — but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group. The safeguard against majority oppression ... is that the court is not bound by the decision of the meeting. It is important Bowen LJ's test should not be applied in such a way that it becomes an instrument of oppression by a minority.

[53] In *Re Telewest and Argos UDL*, the courts held that *the test is based on similarity or dissimilarity of legal rights against the company and not on similarity or dissimilarity of interest not derived from such legal rights.*

[54] Thus, *the fact that individuals may hold divergent views based on their private interest not derived from their legal rights against the company is not a ground for calling a separate meetings.*

[55] The strict distinction between 'legal rights' and 'interest' can sometime be challenging, leading Hildyard J in *Re Apcoa* to make the following comment:

> [51] My own sense is that, although the difference (which is plain) between legal rights against the company and personal interests or objectives in the case of particular creditors has always been recognised and emphasised, the importance attached to the difference has somewhat varied over the years. A tendency that developed was to regard Bowen LJ's classis test as to the meaning of the term 'class' as connoting a single ultimate question, that is, whether the class constitution was such that any differences in the

A rights and the interests of the members of the proposed class were not such as to prevent them consulting together with a view to their common interests. Post as a single question in that form, the test invites, indeed requires, consideration of interest.

[56] *The established and prevailing approach is to break the question into a two stage test:*

B

(a) *whether there is any difference between the creditors inter se in their strict legal rights; and*

(b) *if there is, to postulate by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interests or subjective motivations operating in the case of any particular creditors* (see *Re Apcoa* at para. [52]).

C

[57] The two stage test was helpfully elaborated and clarified by Lady Wolffe in *Premier Oil Plc and Premier Oil UK Ltd* [2020] CSOH 39 ('*Premier Oil Plc*') at para. [64] as follows:

D

(1) At the first stage, the court considers the legal rights of the relevant creditors. There are two sets of rights that are relevant in this context (*Re Hawk Insurance Co Ltd* [2001] BCLC 480, at para. 30; *Re DDL Holdings Ltd* [2002] 1 HKC 172 at para. 17):

E

(i) The existing rights against the company, which are to be released or waived under the scheme; and

(ii) The new rights (if any) which the scheme gives to those whose rights are to be released or waived.

(2) If there is no material difference between the legal rights of the relevant creditors, they will form a single class. And there is no need to proceed to the second stage of the test.

F

(3) If there are material difference between the legal rights of the relevant creditors, at the second stage the court needs to assess the relevance of those differences.

G

(4) A class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest in order to avoid the unnecessary proliferation of classes.

...

H

[68] *It is important to note that at both stages of the test, the Court is concerned purely with the legal rights of the relevant creditors as against the scheme company, not their economic interest* (UDL, at para. 27, *Re Primacom Holding GmbH* [2013] BCC 201, paras. 44-45. (emphasis added)

I

[64] In liquidation, BGMCIL and other creditors are all rank in *pari passu* as their debts are all unsecured. The legal rights of BGMCIL against BGMCCSB is the same with that of other unsecured creditors.

[65] In the case of *Wah Yuen* (*supra*), which concerns related party creditors, the Singapore Court of Appeal held that the fact that the companies are related parties, does not require them to be classified in another group:

> 13 Counsel for Wah Yuen correctly submitted that **related party creditors did not constitute a separate class of creditors for voting purposes simply because they were related parties.** This is because "the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings": *UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin*. (emphasis added)

[66] The similarity of rights is tested upon the rights of each creditor in the event of liquidation, namely, whether the rights of these creditors are similar in a liquidation scenario. In this regard in *Airasia X* (*supra*) it was held as follows:

> [59] Thus, in the case where the appropriate comparator is the insolvent liquidation of the company, *the court will look at what the creditors' legal rights inter se in the case the company is in liquidation and compare that with the relative rights of the creditors inter se under the scheme.* If there is a difference between the creditors' relative positions, the court is to assess whether the difference is such as to render the creditors' rights 'so dissimilar that they cannot sensible consult together with a view to their common interest'. (emphasis added)

[67] The alleged BGMCCSB's related companies, BGMCIL, BuiltMaster Engineering Sdn Bhd ("BME"), Built-Master Elevator Engineering Sdn Bhd ("BMEE") are all unsecured creditors. In the case of liquidation, they are entitled to claim against BGMCCSB and they will rank *pari passu* with each other and the other unsecured creditors. Thus, I agree with learned counsel for the applicant that these companies ought to be classified in one single class with the remaining unsecured creditors.

[68] In *Re Landmark Corporation Ltd* [1968] 1 NSWR 759 the Supreme Court of New South Wales held that the seven subsidiary or sub-subsidiary companies ought to be admitted to attend and vote as members of the class of unsecured creditors and decided that the statutory majority was obtained at the meeting.

[69] I have also considered the cases cited by learned counsel for the respondents, namely, *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch) and *In Re Sateras Resources (Malaysia) Bhd* [2005] 6 CLJ 194. Both these cases were decided on their individual and distinct set of facts which are different that the present case. In *Re Lehman* (*supra*) Hildyard J held as follows:

A 89. I agree with Counsel for the Administrators that **the mere fact that the majority creditors have a special interest for supporting the scheme does not, without more, entail that the class was not "fairly represented".** As appears from Plowman J's formulation of the guiding principles in *Re National Bank Ltd* (see paragraph [65] above), the concern is whether the relevant creditors have a special interest which is adverse to, or clashes B with, the interests of the class as a whole. A special interest which merely provides an additional reason for supporting the scheme (without clashing or conflicting with the interests of the class as a whole) does not undermine the representative nature of the vote. This is well established in the authorities both before and after *National Bank Ltd*. …

(emphasis added)

C

[70] I am unable to accept learned counsel for the respondents' argument that BGMCCSB's ultimate holding company and subsidiary companies have a "special interest" of ensuring BGMCCSB's continued survival and that is said to be adverse to, or clashes with, the interests of the class as a whole.

D **[71]** The success of the scheme requires BGMCCSB to survive and continue as a going concern and obtain income to satisfy BGMCCSB's debts of its scheme creditors which includes the respondents. Therefore, it would be in the interest of all the scheme creditors for BGMCCSB to "survive".

[72] This is not something uncommon in many schemes of arrangement. E The argument and position taken by the proposer of the scheme of arrangement is usually that the winding up of the company puts it in a worse position than if the scheme was implemented.

[73] In the case of *Re Sateras* (*supra*) cited by learned counsel for the F respondents, there are several obvious differences as compared to the instant case, *inter alia*, as follows:

(i) The amount owing by the subsidiaries of the scheme company was more than 50% of the total scheme debts. However, here the amount owed by BGMCCSB to its subsidiaries (BME and BMEE) is only around 0.8% G of the total scheme debts. The majority of the scheme creditors are not subsidiaries or related party companies of BGMCCSB and they could have by majority caused the scheme to fail if they voted against the scheme but they did not.

(ii) BGMCIL is not the subsidiary companies of BGMCCSB and H BGMCCSB is not in control of BGMCIL. No evidence of this alleged control was preferred by the respondent.

[74] It is unavoidable in some cases that the company undergoing restructuring under s. 366 CA 2016 would have related party creditors but this does not necessarily mean that those creditors should be treated I differently or classed separately when their rights against the company are the same as the other non-related party creditors.

[75] The Federal Court in *Francis Augustine Pereira v. Dataran Mantin Sdn Bhd & Ors And Other Appeals* [2014] 1 CLJ 161; [2014] 6 MLJ 56 reaffirmed the test formulated by Bowen LJ in *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573 and held as follows:

> [65] With regard to the question of law posed in Legendas appeals, our answer is as follows:
>
> **All creditors of a company whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.**
>
> In other words, we agree with the test formulated by Bowen LJ in *Sovereign Life Assurance Co v. Dodd*, which is still a good law.
>
> (emphasis added)

[76] In the circumstances, the classification of the scheme creditor was proper as the scheme creditors were classified based on their "rights against BGMCCSB", not their "interest".

Votes Of The Related Companies Ought To Be Discounted/Disregarded

[77] The issue here considerably overlaps somewhat with the earlier issue regarding the improper classification of the scheme creditors.

[78] It was submitted by learned counsel for the respondents that alternatively, in the event that this court finds that the class of scheme creditors was properly classified, the class of creditors was not fairly represented in the CCM.

[79] Since I have determined that the classification of the scheme creditors was proper, it does not stand to reason why the votes of the scheme creditors related to BGMCCSB ought to be discounted or disregarded.

[80] Firstly, s. 366(3) CA 2016 confers the right of the scheme creditors under a scheme of arrangement to vote.

[81] Secondly, there is nothing in CA 2016 that empowers the court to discount or disregard the scheme creditors' votes.

[82] In fact, in order to determine if the 75% threshold requirement is met under s. 366(3) CA 2016, the scheme creditors must be allowed to vote on the scheme. This is one of the statutory requirements (*Re National Bank Ltd* [1966] 1 All ER 1006; *Re Telewest* (*supra*), *Airasia X* (*supra*) and *Re Lehman* (*supra*)).

[83] What the court is empowered to do based on the trite principles stated in, *inter alia*, cases such as *Re Telewest* (*supra*) and *Transmile* (*supra*) is to not approve the scheme where it has failed the *bona fide* and the reasonableness tests.

[84] To my mind and with all due respect to both learned counsel for the respondents and the applicant, it is essentially a play of words between them. What it all boils down to and the net effect is that the court will not approve the scheme of arrangement if the court finds, based on the *bona fide* and the reasonableness tests, that:

(i) The class was not fairly represented by those who attended the meeting and that the statutory majority are not acting *bona fide* and are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent;

(ii) The scheme of arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably not approve.

[85] Despite the respondents' allegations that the *bona fide* test was not satisfied, they have not shown any evidence that the class was not fairly represented or that the majority was not acting *bona fide* or that the minority was being coerced to promote interests adverse to those of the class whom they purport to represent. The respondents' allegations are again similar to the issues on the improper classification of creditors and are essentially that:

(i) There are substantial related party scheme creditors of BGMCCSB which includes Kas Engineering Sdn Bhd, Modular Construction Technology Sdn Bhd, Bras Venture Berhad, B&G Global Property Sdn Bhd, Correct Lifestyle Sdn Bhd which the respondents claim is connected to BGMCCSB through direct or indirect interests such as shareholders or directors.

(ii) The related party scheme creditors have special interests in the scheme in that they have a special interest to see BGMCCSB's continues as a going concern which is not in line with the interest of the other scheme creditors.

(iii) That these related party scheme creditors casted their votes in favour of the scheme. This goes to the argument of the voting pattern of the scheme creditors.

[86] I have considered the applicant's response to the respondents above allegations and I agree with the following submissions by learned counsel for the applicant on this issue:

(i) Even in the best case for the respondents, there are still 67% (or approximately 2/3 of total value of the scheme creditors) who are in support of the scheme (after removing the votes of all the related companies).

(ii) Referring to the list of votes for the scheme ("respondents' list") as exhibited in respondents in their respective affidavits in reply at pp. 104 to 111 of encls. 45 to 48, the votes of the alleged related companies (in particularly in respect of Modular Construction Technology Sdn Bhd ("Modular") as there is no commonality of shareholders), it is evident from the respondents' list that Bras Ventures, B&G Property and Correct Lifestyle have not voted in the CCM. It is therefore illogical to deduct their value from the total votes when they have not casted any. For clarity the respondents' list is reproduced below.

Related Companies	Value (RM)	Votes during CCM
BGMCIL	124,987,469.48	124,987,469
BME	1,386,784.02	1,386,784
BMEE	735,420.16	735,420
KAS	2,615,712.36	2,615,712
Modular Construction Technology Sdn Bhd	11,500,000.00	11,500,000
Bras Ventures Bhd	682,929.40	N/A
B&G Global Property Sdn Bhd	32,954.35	N/A
Correct Lifestyle Sdn Bhd	1,009,617.18	N/A
	Total:	141,225,385

(iii) Applying the manner of calculation of the respondents as stated in para. 30 of the respondent's written submissions in encl. 83, the total votes in favour of the scheme excluding the alleged related companies' votes would then be as follows:

$$\frac{\textit{Total vote in favour of the Scheme} - \textit{Votes of BGMCIL,BMEE,BME KAS ,Modular Construction}}{\textit{Total votes} - \textit{Votes of BGMCIL,BMEE,BME,KAS,Modular Construction}} \times 100\%$$

$$= \frac{195,423,386 - 124,987,469 - 735,430 - 1,386,784 - 2,615,712 - 11,500,000}{221,366,910 - 124,987,469 - 735,430 - 1,386,784 - 2,615,712 - 11,500,000} \times 100\%$$

$$= \frac{54,197,991}{80,141,515} \times 100\%$$

$$= 67.62\%$$

(iv) Hence, even in the worst-case scenario for the applicant (where substantial supporting scheme creditors' view are disregarded), there is more than 2/3 of all the scheme creditors who was in favour of the scheme. This is an important consideration, as the support to the scheme is not due to any oppression or undue influence by majority.

[87] Learned counsel for the respondents further submitted in the alternative that the court should discount the votes of the related party scheme creditors of BGMCCSB in accordance with their ascertained interest and the case of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd and another appeal* [2012] SGCA 9; [2012] 2 SLR 213 was cited.

[88] However, the basis of the decision of *The Royal Bank of Scotland* (*supra*) is that there was no evidence to rebut the presumption that the "wholly owned subsidiaries" were in entire control of the scheme company. The court was entitled, therefore, to treat the subsidiaries votes as if they are the scheme company, and not reflective of the general view of creditors. The situation is different in the present case and the decision in *The Royal Bank of Scotland* (*supra*) is not applicable as pointed out by learned counsel for the applicant based on the following reasons which I agree:

(i) For BGMCIL, it is the ultimate holding company listed in Hong Kong. There cannot be any presumption that the scheme company has influenced the decision of BGMCIL. The decision to support the scheme was unanimously made by the Board of BGMCIL, the majority of which by independent directors. There is no evidence to suggest that they are either involved in controlling BGMCCSB or are being controlled by BGMCCSB or its directors. This is mere speculation by the respondents without material evidence.

(ii) For other partially owned subsidiaries, namely BME and BMEE, the shareholding of BGMCCSB in these subsidiaries was 80%. The decision to vote in favour of the scheme was made by the unanimous decision of the boards of BME and BMEE while there are other directors within the boards of BME and BMEE, who are not personally related to BGMCIL, the applicant and/or BGMCCSB.

(iii) For the other alleged "related party" as mentioned by learned counsel for the respondents, namely KAS, Modular, Bras Venture Berhad, B&G Global Property Sdn Bhd and Correct Lifestyle Sdn Bhd, there is no evidence to suggest that BGMCCSB could have control over the affairs of these companies and *vice versa*.

(iv) Just because there is some connection between these companies and BGMCCSB does not mean and should not be taken to mean that BGMCCSB has control over them. It would be manifestly unfair to make such a presumption by using the slightest connection between these companies and BGMCCSB.

(v) Further, the indirect interest of BGMCIL in BGMCCSB (through its interests in BGMC Malaysia Limited and the applicant), as the registered shareholder of BGMCCSB) is RM10,000,000.

(vi) Thus, even if *The Royal Bank of Scotland*'s (*supra*) decision is applied, only RM10,000,000 is to be discounted. After the discount, there is still 83.7% approval as can be seen from the following calculation:

$$\frac{\textit{Total votes in favaour the Scheme} - \textit{BGMCIL's shareholding in BGMCCSB}}{\textit{Total votes}} \times 100\%$$

$$\frac{195{,}423{,}386 - 10{,}000{,}000}{221{,}366{,}910} \times 100\%$$

$$\frac{185{,}423{,}386}{221{,}366{,}910} \times 100\%$$

= **83.76% (in favour of the Scheme)**

(vii) Accordingly, BGMCIL's interest as creditors of BGMCCSB (with debts totalling of RM124,987,469.48) far outweighs its interest as shareholder of BGMCCSB (RM10,000,000 held through BGMC Malaysia Limited and the applicant).

(viii) However, as stated earlier there is no justification on the facts for any discount of votes to be exercised. There is no basis to discount the debt of the ultimate holding company.

[89] The respondents' suggestion that all related company creditors' votes are to be discounted irrespective of the terms of the scheme and relationship between the creditors and scheme company is unreasonable and is not in line with the principles stated in *Re Lehman* (*supra*), *Re Century Sun International* [2021] HKCU 4788 and *Re: App (Hong Kong) Ltd* [2004] HKCU 477.

[90] In *Re Century* (*supra*), the High Court Hong Kong Court of First Instance held:

> **Did the approval of Scheme fairly reflect the interests of Scheme Creditors?**
>
> [22] The majority of the debt compromised by the Scheme is inter-company debt. Scheme Creditors, who are also subsidiaries of, or associated with the Company, account for around 67% of the debt to be compromised by the Scheme. The Opposing Creditors argue that it can

A be inferred that the Group creditors are motivated by additional reasons such as advancing the wider business plan of the Group. It may well be that the boards of the Group creditors see other advantages to the Scheme being implemented other than a better return than that which is likely to be achieved if the Company is put into liquidation. However, that is not the test. The test is whether because of their additional interests
B their views cannot be regarded as fairly representative of the class. The Opposing Creditors identify reasons why the Group creditors may have an additional interest in the Scheme being implemented, but they do not point to any reasons for concluding that their decision to support the Scheme as an alternative to liquidation is not fairly representative of the views of unsecured Scheme Creditors generally. *It cannot be the case that*
C *simply because there are reasons why a creditor may perceive advantages in supporting a scheme, which are irrelevant to other creditors, that their opinion should be viewed as likely to be a typical of the class and thus should be discounted. What is necessary, absent direct evidence of a creditor's motives for supporting a scheme, is for matters to be identified from which it can reasonably be inferred that a creditor*
D *in voting for the scheme was not primarily motivated by an assessment of whether or not the benefits of the scheme were more attractive than the likely outcome if the company were to go into liquidation.* I agree with Mr Ho Hnat the focus is on why the creditor supports a scheme rather than why a creditor might not. For this reason one way of testing whether or not there is reason to think that the creditor was unrepresentative of the class, is to ask
E *whether there is anything that suggests if the creditor, whose motive is impugned had not had the "special interest" in question, he would have voted differently. The Opposing Creditors have not pointed to anything, which suggests that Group creditors would have voted differently but for their relationship with the Company.* This is in contrast with the Opposing Creditors apparently voting against because they thought that they would lose their rights against CS Mauritius,
F although in fact it has subsequently been clarified that they will retain that right under a new agreement that has been signed. I, therefore, do not consider that the Group creditors' vote, or any part of it, should be discounted. (emphasis added)

[91] Further, in *Re: App* (*supra*) the High Court Hong Kong Court of First
G Instance held:

37. As stated earlier, for present purpose, the Company is required to establish reasonable prospects of a viable scheme with sufficient in-principle support. *I am unable to draw a compelling inference that in giving their support the related parties must have been motivated by interests other than those to*
H *which an intelligent and honest man, acting in the interests of the class as a whole, might have regard, so that the votes of the related parties would inevitably be discounted at the sanction hearing.* It seems to me that the matters put forward by the Company do merit serious consideration and there is something to be said for the commerciality of the proposed scheme. I am inclined to agree with Mr Manzoni that it is reasonably arguable that the votes
I of the related parties may not necessarily be discounted at the sanction stage, so that the Company has shown reasonable prospects of a viable scheme with sufficient in-principle support. (emphasis added)

[92] In the present case, there is special feature which is not found in any of the cases referred by learned counsel for the respondents and this condition is that BGMCIL will subordinate its claims against BGMCCSB to the rest of creditors. It shows that the votes of BGMCIL had been casted with "class promoting view". BGMCIL does not enjoy any additional benefit from the scheme, but rather subordinated its interest to the benefit of other creditors. The indirect shareholding interest of BGMCIL in BGMCCSB does not override the "class promoting view" in the scheme.

[93] Learned counsel for the respondents submitted that the respondents wanted their debts to be paid. The scheme voted by the majority does exactly the same. The scheme provides the scheme creditors better deals as compared with the liquidation scenario, particularly, the single biggest unsecured creditor, BGMCIL will not be ranked in *pari passu* under the condition of the scheme.

[94] BGMCIL can be motivated by ensuring that BGMCCSB continues as a going concern, but this is not an interest that clashes with the interests of the scheme creditors as a whole. As I had stated earlier, the scheme and the interests of the general creditors depend on BGMCCSB continuing its trades.

[95] There is nothing wrong for any creditor to be interested in ensuring that the scheme company continues as a going concern. In fact, the paramount objective of s. 366 CA 2016 is to ensure the scheme company continues as a going concern (*Airasia X* (*supra*)).

[96] Learned counsel for the applicant has also aptly provided various scenarios where the votes of the related party scheme creditors votes were discounted based on the respondents' arguments. These scenarios show a voting pattern which ultimately favours the scheme and this can be seen in the following calculations:

(1) Scenario A (with BGMCIL, BMEE, BME and KAS's votes fully discounted)

$$\frac{Total\ votes\ in\ favour\ the\ Scheme - BGMCIL - BMEE - BME - KAS}{Total\ votes - BGMCIL - BMEE - BME - KAS}\ x\ 100\%$$

$$= \frac{195{,}423{,}386 - 124{,}987{,}469 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712}{221{,}366{,}910 - 124{,}987{,}469 - 735{,}420 - 1{,}386{,}784 - 2{,}615{,}712} \times 100\%$$

=71.69% in favour of the Scheme

A **(2) Scenario B (With BGMCIL's votes discounted to the extent of its share value & with BGMCCSB's subsidiaries - BMEE, BME and the related company - KAS's votes fully discounted):**

B $$\frac{Total\ votes\ in\ favour\ the\ Scheme - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME - KAS}{Total\ votes - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME - KAS} x\ 100\%$$

C $$= \frac{195,423,386 - 10,000,000 - 735,420 - 1,386,784 - 2,615,712}{221,366,910 - 10,000,000 - 735,420 - 1,386,784 - 2,615,712} \times 100\%$$

=87.44% in favour of the Scheme

D **(3) Scenario C (With BGMCIL's votes discounted to the extent of its share value and with BGMCCSB's subsidiaries - BMEE, BME's votes fully discounted):**

E $$\frac{Total\ votes\ in\ favour\ the\ Scheme - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME}{Total\ votes - BGMCIL's\ shareholding\ in\ BGMCCSB - BMEE - BME} x\ 100\%$$

F $$= \frac{195,423,386 - 10,000,000 - 735,420 - 1,386,784}{221,366,910 - 10,000,000 - 735,420 - 1,386,784} \times 100\%$$

= 87.60% in favour of the Scheme

G **(4) Scenario D (With BGMCCSB's subsidiaries – BME, BMEE and the related company – KAS's votes fully discounted):**

H $$\frac{Total\ votes\ in\ favour\ the\ Scheme - BMEE - BME - KAS}{Total\ votes - BMEE - BME - KAS} x\ 100\%$$

I $$= \frac{195,423,386 - 735,420 - 1,386,784 - 2,615,712}{221,366,910 - 735,420 - 1,386,784 - 2,615,712} \times 100\%$$

=88.02% in favour of the Scheme

(5) Scenario E (With BGMCCSB's subsidiaries – BME, BMEE's votes fully discounted)

$$\frac{Total\ votes\ in\ favour\ the\ Scheme - BMEE - BME}{Total\ votes - BMEE - BME}\ x\ 100\%$$

$$= \frac{195{,}423{,}386 - 735{,}420 - 1{,}386{,}784}{221{,}366{,}910 - 735{,}420 - 1{,}386{,}784} \times 100\%$$

=88.17% in favour of the Scheme

The Scheme Is Unfair And Lacked *Bona Fide*

[97] The respondents alleged that the scheme was not fair and lacked *bona fide* as the explanatory statement provided to the scheme creditors contained misleading information and/or failed to provide material information critical to make a conclusion on the scheme.

[98] The misleading information and/or lack of information complained by the respondents are summarised as follows:

Shah Alam High Court Suit

(i) The Shah Alam High Court Suit of RM25,251,526.22 against BGMCCSB ("the SAHC Suit") that was subsequently struck out but the fact that it was struck out was not stated in the explanatory statement.

(ii) It was also not stated that there was a co-defendant together with BGMCCSB, that is Kingsley Hill Sdn Bhd in the SAHC Suit.

(iii) The striking out of the SAHC Suit was subsequently announced by BGMCIL on 11 December 2020.

(iv) The information regarding the SAHC Suit is said to be misleading and purports to support the scheme.

The Retail Lots

(v) The unsatisfied open charge by OCBC Al-Amin Bank Berhad ("OCBC Al-Amin") over 43 parcels of Retail Lots known as V Residensi 2 @ Shah Alam ("Retail Lots") *vide* a deed of assignment as of 4 August 2021 was allegedly not disclosed in the explanatory statement.

(vi) The market value of the retails lots as quoted by the applicant of RM25,000,000 in its estimated recovery value ("ERV") and the estimated value as per the applicant's statement of affairs of RM20,000,000 are contradictory to each other.

Contra Properties

(vii) There are discrepancies as to the value of the contra properties.

(viii) In the explanatory statement for the security of the RSLS, the applicant claimed that market value of the contra properties is RM36,098,440. However, the contra properties had also been valued as having the net book value ("NBV") of only RM25,504,580 and ERV of only RM19,128,435 concurrently.

[99] The applicant has successfully and clearly responded to the above allegations by the respondents of misleading information and/or lack of information.

[100] I accept the applicant's said response which I summarise below.

Shah Alam High Court Suit

[101] The explanatory statement has disclosed the material litigation involving BGMCCSB and the fact that BGMCCSB is the defendant in the SAHC Suit. Kingsley Hill Sdn Bhd being the co-defendant in the SAHC Suit has nothing to do with BGMCCSB and/or the scheme. The material fact here is the existence of material litigation and that has been sufficiently disclosed.

[102] As at 15 May 2021, the SAHC Suit was still not completely resolved as despite the striking out, some of the plaintiffs had lodged appeals against the striking out decision. The hearing of the appeals was fixed on 25 August 2021 which is after date of the explanatory statement of 25 May 2021. Hence, there is no issue of misleading information in this case and it is proper to include the SAHC Suit as one of the material litigations in the explanatory statement.

[103] I would further add the fact that the SAHC Suit was struck out was announced by BGMCIL *vide* its announcement dated 11 December 2020 in The Stock Exchange of Hong Kong Limited. This was acknowledged by the respondents.

[104] Therefore, this information was publicly available about five months prior to the CCM and the respondents cannot feign ignorance of this fact.

[105] In addition to this the respondents never raised this issue regarding the SAHC Suit at the CCM or the several meetings held prior to that by BGMCCSB.

The Retail Lots

[106] The applicant had in its affidavits in reply (encls. 45 to 48) confirmed that BGMCCSB will proceed to discharge the retail lots for the purpose of the RSLS once it obtains the order of the court for sanction of the scheme. It is important for me to highlight at this juncture that the discharge of the retails lots was an addition condition which I had included in the sanction order as part of the sanction granted by this court.

[107] The existence of the charge on the retail lots would only materially affect the performance of the scheme if and only if there is inability on the part of BGMCCSB to discharge. However, as shown in BGMCCSB's announcement to dispose of KAS, part of the disposal of KAS will be used to pay the bank facilities.

[108] Be that as it may, the issue here is again, as in the case of the information regarding the SAHC Suit, that the information regarding the charge on the retail lots was made publicly available well before the CCM.

[109] Further, the information regarding the retail lots and the charge over them can be reasonably obtained from the statement of affairs.

[110] Therefore, the respondents really have no reason to complain.

[111] As for the allegation that there are discrepancies and a contradiction in the market value of the retail lots in the statement of affairs and the ERV, the respondents' allegation is misconceived and have failed to appreciate the following:

(i) The difference between the market value and the ERV was an advice pursuant to the scheme advisor, premised on several market forces, as explained in the applicant's reply affidavits (paras. 8.2.2 of encls. 45 to 48), such as impact of the pandemic to the property market, maintenance charges to be incurred, quit rent, assessment and so on.

(ii) It is called "estimated" realisable value, which means that the value is merely an estimation and not definitive. The scheme creditors were not misled by this reference. It is a matter of opinion. Hence, there is no basis to say that there is misrepresentation of the fact. The scheme creditors having been informed that the value was mere estimation, is entitled to form their own opinions.

[112] The valuation report confirmed that the market value of the retail lots was RM25,000,000. Although the valuation was conducted in September 2020, it was less than a year from the CCM on 16 June 2021. Thus, there is no necessity to have another report or valuation to be conducted. In any event the respondents did not show evidence that the value of the property has substantially altered. Their contentions were merely based on their personal opinion which is not substantiated by any independent or professional report.

[113] I must put emphasis on the fact that the explanatory statement regarding the scheme can contain certain opinions and estimates which are usually given by independent professional financial advisers such as the scheme adviser. It is up to the scheme creditors to assess for themselves whether to accept or reject these opinions.

[114] The reasonable creditor being part of a scheme of arrangement ought to independently assess the scheme. In this regard they should also avail themselves of information which is in the public domain.

[115] At the court convened creditor's meeting the scheme creditors are entitled to ask questions and query every aspect of the scheme. Failure to do so could affect any complain the scheme creditor may have at the sanction stage.

[116] Again, in the present case as in the case of the SAHC Suit, the respondents never raised the above issues regarding the retail lots at the CCM or at several meetings held prior to that. These matters were raised after the event and can be construed as an afterthought. It also goes to the *bona fides* of the respondents' complaints themselves.

Contra Properties

[117] The contra properties have a listed price totalling RM36,098,440. Upon negotiations and agreements between BGMCCSB and its debtors, and after factoring the marketability of these contra properties, the contra value arrived at was RM25,504,580.

[118] Thus, this amount was then recorded as the NBV of the contra properties for settlement of outstanding sums, RM25,504,580.

[119] The ERV of RM19,128,435 was based on the net realisable value and the forced sale value in the event of liquidation of BGMCCSB and the basis of the estimation was pursuant to the advice from the scheme adviser, in which the applicant and BGMCCSB have taken into account of the impact of the pandemic of Covid-19 to the property market as well as the other factors such as maintenance charges for upkeeping of the properties, quit rent, assessment and so on.

[120] All the above three different assigned values were disclosed and shown in:

(i) The statement of affairs; and

(ii) The explanatory statement.

[121] The respondents have no factual or evidential basis to dispute the market value or the NBV or ERV of the contra properties which was the listed price, amount received from BGMCCSB's debtors for settlement of outstanding sums as well as the estimation pursuant to the advice of the scheme advisor of BGMCCSB and premised on several market forces.

[122] Similar to the case of the SAHC Suit and the retail lots, the issues raised by the respondents regarding the contra properties were not raised at the CCM or the meetings held before the CCM where BGMCCSB had given the scheme creditors an opportunity to engage with it before the CCM.

[123] This, to my mind, is fair and it would give the proposer of the scheme to take into consideration any issues raised by the scheme creditors as early as possible and address them accordingly. In the present case, the scheme was improved after taking into account certain issues raised by the scheme creditors.

[124] That is one of the reasons I am unable to accept the respondents' complaints on misleading information or the lack of information. The respondents had every opportunity to raise these matters with BGMCCSB before or at the CCM but they chose not to do so. At the very minimum if these matters were raised at the CCM then the other scheme creditors could also be involved in any discussion that ensued. It does not augur well for the respondents to only now raise a myriad of issues when they could have done so before and at the CCM.

[125] On the issue of the materiality of the information regarding the scheme and what should or should not be disclosed as well as the extent of the information to be disclosed, this will depend largely on the type of information and is based on the facts of each particular case. The issue is also whether the information is fundamental.

[126] On this issue of disclosure of information in respect of a scheme of arrangement, in *Re UDL Holdings Ltd & Ors* [2006] HKCU 917 it was held as follows:

> **If the explanatory statement had given all information reasonably necessary**
>
> [39] I will also start with the legal principles, which are not in dispute. For the court to sanction the Modifications, *it must be satisfied that the Scheme Modification Document sent to the scheme creditors was "perfectly fair and as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote*" (*Re Dorman, Long & Co., Ltd.* [1934] 1 Ch 635 at 657). *What sort of information is reasonably necessary and the extent of the information that should be supplied would depend on the facts of the particular case.* Thus, in *Re Kansa Genera/International Insurance Co. Ltd. (in compulsory liquidation)* [1999] 1 HKC 254, the court held that whilst there were considerable deficiencies in the financial information provided, the deficiencies were not so fundamental as to negative the consent of the scheme creditors and so did not withhold sanction to the scheme. In *Re Heron International NV* [1994] 1 BCLC 667, although the information provided to creditors could be fairly criticized on one or two points, when further information was produced in evidence, the court did not think such information would have caused any consenting creditor to change his mind and the scheme was sanctioned.
>
> …

A [46] I think *the essence of the complaint is inadequacy of information rather than a total lack of it, as some pertinent information has been provided, by and large, in the Scheme Modification Document. Further information has been provided by the scheme administrator in his affidavits filed in these proceedings. Whether the extent of the information provided is sufficient in all the circumstances is a matter of fact and degree. The information in the Scheme Modification Document should be*
B *considered in the light of what was already known to the scheme creditors as to the progress of the administration of the Schemes and the difficulties encountered.* The scheme administrator had held 14 formal meetings with the committee of inspection since the Schemes became effective in April 2000. In addition, he had from time corresponded with members of the committee on the progress and issues relating to the Schemes. At a meeting of the
C committee of inspection on 11 July 2005 which was prior to the court meeting, the scheme administrator provided a summary of all the work done from 2000 to 2005, and a copy of this was produced in evidence. *I am not prepared to refuse sanction on this ground, as I am not persuaded that further information along the lines as indicated by Fonfair would have a material effect on*
D *the voting or caused any consenting scheme creditor to change his mind.*

(emphasis added)

[127] In *Re Kansa General International Insurance Co Ltd (in compulsory liquidation)* [1999] 1 HKC 254 it was held as follows:

In my judgment, **whilst there are considerable deficiencies in the financial**
E **information, they are not so fundamental as to negative the consent of the Scheme Creditors.** The acceleration of receipts is plainly an important if not the decisive factor from the perspective of any Scheme Creditor. So whilst I do not consider that the court's sanction should be withheld, this should be fair warning to petitioners that full and accurate information as to the financial impact of any scheme is required and failure to provide
F such information may result in costs being disallowed.

(emphasis added)

[128] The following can be summarised from the above authorities of *Re UDL Holdings* [2006] (*supra*) and *Re Kansa General* (*supra*) in so far as it applies to the instant case:

G (i) Not all information needs to be disclosed.

(ii) Whether the extent of the information provided is sufficient in all the circumstances is a matter of fact and degree (*Re UDL Holdings* [2006] (*supra*)).

H (iii) The court takes into account whether the information is so fundamental as to negative the consent of the scheme creditors (*Re Kansa General* (*supra*)).

(iv) The information in the scheme documents or explanatory statement
I should be considered in light of what the scheme creditors already know. This would include information which are in the public domain or is otherwise publicly available (*Re UDL Holdings* [2006] (*supra*)).

(v) The information or materials can be made available through, *inter alia*, the statement of affairs (*Re UDL Holdings* [2006] (*supra*)).

(vi) The court will focus on the general purpose of the explanatory statements and decide if the alleged shortcoming of the information would have material effect on the decision of the scheme creditors.

[129] Having considered the complaints by the respondents on this issue in detail I find that apart from what I have stated above, the complaints are really not because the information is misleading or insufficient. Rather, it would appear to me that the respondents' criticism of the scheme is something that came about after the CCM and is centred on challenging the scheme by searching for weaknesses in it after it was approved by a majority of the scheme creditors.

[130] I find no merits in the respondents' complain on this issue that the scheme is unfair and lacked *bona fide*.

The Scheme Is Unreasonable

[131] I have earlier dealt with at length the merits of the scheme itself in particular regarding the purpose and rationale of the scheme. In this regard I have also set out in detail the background of the scheme.

[132] I accept the applicant's reasons and purpose of the scheme as stated in para. 55 above. I do not find the scheme to be unreasonable.

[133] The court's role at the sanction stage has been summarised earlier in para. 53 above and it is not necessary for me to repeat it save to say that the court, in exercising its supervisory role, will leave it generally to the scheme creditors to make their own decision using their commercial judgment (*Re Axa* (*supra*); *Re BRL Hardy* (*supra*); *Re Sonodyne* (*supra*); *Sentoria* (*supra*)).

[134] I am aware and cautious of the fact that the court should not embark on a detailed analysis of the merits of the scheme as against another (*Transmile* (*supra*)) and substitute the commercial judgment of the scheme creditors with the court's.

[135] In *Re Apcoa Parking Holdings GmbH* [2016] 1 All ER 30 the court held as follows:

> SANCTION HEARING
>
> [126] *The principles the court must apply when considering whether to sanction a scheme of arrangement are well established.* The most regularly cited passage (see, for example, Lloyd J in *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch), [2002] 2 BCLC 510 (at [29]) and *Re Telewest Communications plc (No 2); Re Telewest Finance (Jersey) Ltd (No 2)* [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772 (at [20])) is derived from a passage in Buckley on the Companies Acts, approved by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829: …
>
> …

A [128] *The court's role is not to substitute its own assessment of what is reasonable for that of the creditors. They are much better judges of what is in the commercial interests of the class they represent than the court.* This approach is clear from amongst others the following authorities:

(1) *Re Alabama New Orleans Texas and Pacific Junction Rly Co* [1891] 1 Ch 213 at 247 per Fry LJ:

B

> Under what circumstances is the Court to sanction a resolution which has been passed approving of a compromise or arrangement? *I shall not attempt to define what elements may enter into the consideration of the Court beyond this, that I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it.*

C

D …

> [129] These authorities make clear that *the court must give full weight to the decision of the creditors,* acting in their capacity as members of the class in which they are voting. *It is not sufficient for the court to determine that it would not have reached the same decision as the creditors themselves reached.* In the absence of some procedural or jurisdictional hurdle (or of some blot on the face of the scheme itself), the court should only decline to sanction the scheme if an intelligent and honest member of the relevant class acting in respect of his interest could not reasonably have approved it.
>
> (emphasis added)

E

F **[136]** Based on the authorities such as *Re Apcoa* (*supra*), I see no reason not to give effect to the decision of the majority of the scheme creditors that has met and exceeded the statutory 75% threshold requirement.

BGMCCSB Is Hopelessly Insolvent

G **[137]** It is not in dispute that BGMCCSB is facing financial difficulty and currently suffering from cash flow issue. That is why the scheme and indeed many schemes of arrangement are proposed, *ie*, due to some financial difficulties which the companies may face.

H **[138]** In this regard, with respect, learned counsel for the respondents' reliance on *Airasia X* (*supra*) to say that BGMCCSB is hopelessly insolvent in the context of the present case is misplaced.

I **[139]** In contrast with *Airasia X* (*supra*), here BGMCCSB is not seeking for assistance from any white knight or fresh injection of capital. The repayment to the scheme creditors under the scheme is from the self-generated income, with substantial amount backed by fixed assets (inclusive of RM25,000,000 of the retail lots and RM36,098,440 of the contra properties, totalling

RM61,098,440). Another RM40 million is from KAS's disposal which has been completed and the proceeds earmarked. Thus, about 70% of the funds needed for the implementation of the scheme is guaranteed.

[140] Learned counsel for the applicant also pointed out that BGMCCSB is still in active trading and is currently engaged in three major projects, namely T035-Spice Hotel, T306-Seputeh, and T042-Bangsar, which would contribute revenue to BGMCCSB upon completion of these projects.

[141] The respondents' allegation that BGMCCSB is hopelessly insolvent is based on its simple analysis and deduction of BGMCCSB's financial position by comparing BGMCCSB's projected cashflow against the scheme debt. The respondents' allegation is not supported by, for example, a counter report or analysis by a financial expert or professional.

[142] Learned counsel for the applicant submitted that:

(i) It is the respondents' averment that the projected cashflow of RM107,303,401.13 is insufficient to meet the scheme debts of RM144,735,840.60. However, with the subordination of the claims by BGMCIL, the remaining scheme creditors are not at the risk of recovering their debts under the scheme despite such shortfall. The projected cashflow is approximately 30% more that the scheme debts payable to the remaining creditors.

(ii) Further, considering the revenue to be generated by BGMCCSB from its major projects above, the liquidity of BGMCCSB will improve post the implementation of the scheme and thus enable BGMCCSB to continue trading and to secure more construction works and projects in the future. Hence, there is lack of factual basis for the respondents to argue that BGMCCSB is hopelessly insolvent post implementation of the scheme.

[143] Therefore, I am not persuaded by learned counsel for the respondents' argument that BGMCCSB is hopelessly insolvent.

[144] The first and third respondents also averred that their claims were not being recognised by BGMCCSB and it amounts to breach of natural justice by the applicant. However, they have failed to furnish sufficient documents in support of their proof of debt, even after being challenged by the applicant at this sanction stage.

[145] In any event, I agree with learned counsel for the applicant that the differences in the amount claimed by the first and third respondents and amount recognised under the scheme is not a ground to dismiss this originating summons. The alleged overclaim sum has no bearing on and would not affect the scheme.

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Conclusion

[146] I find that the statutory 75% threshold requirement has been met and that the *bona fide* and reasonableness tests have both been satisfied.

[147] In the circumstances, I allowed the originating summons with no order as to costs.

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